IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08/10/2004

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE K.P. SIVASUBRAMANIAM

H.C.P.No.762 OF 2004

Syed Barkath,
S/o. Syed Ghouse .. Petitioner

-Vs-

1. The State of Tamil Nadu,
Rep. by the Secretary to the Govt.,
Prohibition and Excise Department,
Fort St. George, Chennai 9.

2. The Union of India,
Rep. by its Secretary to the Govt.,
Ministry of Finance,
Department of Revenue,
New Delhi.

3. The Superintendent of Central Prison,
Central Prison, Chennai. .. Respondents

Petition filed under Article 226 of the Constitution of India for the issuance of Writ of Habeas Corpus as stated therein.

For Petitioner : Mr.B. Kumar,
Senior Counsel for
Mr.A. Ganesh

For Respondents 1&3 : Mr. Abudu Kumar Rajaratinam
Govt. Advocate (Crl.Side)

Respondent-2 : Mrs. Vanathi Srinivasan

:J U D G M E N T

P.K. MISRA, J

The order of detention dated 2.6.2004 passed by Respondent No.1 under Section 3(1)(i) of the Conservation of Foreign exchange and Prevention of Smuggling Activities Act, 1974 (Central Act 52 of 1974) has been challenged in the present Habeas Corpus Petition filed by the brother of the detenu.

2. The facts may be noticed in brief :-

The detenu came from Singapore to Chennai by flight on 22.5.2004. While the detenu was proceeding, he was intercepted by the officials of Directorate of Revenue Intelligence and baggages were examined and the goods were inventorised and according to the officials of DRI, the goods were valued at Rs.11,62,500/-. Statement of the detenu was recorded. According to the affidavit filed in the Habeas Corpus Petition, the statement was not voluntary, and as per the directions given by the DRI officials, the statement was recorded. The statement indicated as if the goods were brought by the detenu under the instruction of one T. Mahesh. It is further stated in the affidavit that the detenu sent a retraction letter to the sponsoring authority on 24.5.2 004. Ultimately, an order of detention was passed in respect of the detenu. Along with the present detenu, the aforesaid T. Mahesh was also detained. In the grounds of detention, it is indicated as if the smuggling activity had been done by the detenu as a carrier on behalf of T. Mahesh. To appreciate the contentions raised by the learned Senior Counsel for the petitioner, it is unnecessary to go into other details of the detention order.

3. It is not disputed that the Advisory Board while considering the detention of T. Mahesh, by its opinion dated 21.7.2004, opined that there was no sufficient reason to detain T. Mahesh. Ultimately, on the basis of such advice, the order of detention under COFEPOSA in respect of T. Mahesh was revoked on 27.7.2004. Subsequently, the Advisory Board considered the case of the present detenu and advised for continuing such detention and ultimately, such advice was accepted by the State Government and by order dated 27.8.2004, the order of detention was confirmed by the State Government.

4. In the context of the aforesaid background, learned Senior Counsel for the petitioner has submitted that the fact that order of detention in respect of the co-detenu T. Mahesh had been revoked by the State Government on the basis of the opinion furnished by the Advisory Board was not placed for consideration before the State Government and without considering the aforesaid aspect, the State Government has passed the order of confirmation. It is contended that even at the stage of confirmation, the State Government is required to consider all relevant factors and the fact that the order of detention in respect of the co-detenu, who had been detained on the basis of the self-same incident, had been revoked being a relevant factor, should have been placed for consideration before the State Government at the time of confirmation of the order of detention.

5. Learned counsel appearing for the State has submitted that the order of detention in respect of T.Mahesh was revoked on the basis of the opinion of the Advisory Board and such revocation, which was on the basis of the opinion furnished by the Advisory Board, has no relevance for the purpose of considering the question of confirmation of the order of detention. He has further submitted that the opinion of the Advisory Board was on account of technical defects and had nothing to do with the merits of the allegations against T. Mahesh, and therefore, there was no necessity to place such order of revocation/ opinion of the Advisory Board before the State Government while considering the question of confirmation.

6. In AIR 1983 SC 541 (MOHD. SHAKEEL WAHID AHMED v. STATE OF MAHARASHTRA AND OTHERS), a Constitution Bench of the Supreme Court was considering somewhat similar question. In the said case, prior to the detention of the detenu concerned, another person was detained by the same Government in relation to the very same incident. On the basis of the opinion of the Advisory Board to the effect that there was no sufficient cause for the detention of such other person, that person had been released. It was submitted by the counsel for the detenu before the Supreme Court that one of the grounds on which the petitioner was detained being the same as one of the grounds on which the other person had been detained, the fact that the Advisory Board had reported that there was no sufficient cause for the detention of such other person ought to have been placed before the detaining authority, who passed the order of detention in respect of the petitioner before the Supreme Court. It was contended that

... the failure of the State Government to place a highly relevant and important piece of material before the detaining authority vitiates the order of detention. If the detaining authority in the instant case were apprised that the Advisory Board had reported on examining, inter alia an identical ground that there was no sufficient cause for detention of another person involved in the same transaction, it may not have passed the order of detention against the petitioner, which is based on similar facts.

Accepting the aforesaid contention, the Supreme Court observed :-

6. ... It is clear that Shamsi was detained for engaging in a

smuggling activity arising out of the same incident and transaction which forms the subject-matter of ground No.1 in the instant case. The opinion of the Advisory Board that there was no sufficient cause for Shamsis detention may not have been binding on the detaining authority which ordered the detention of the petitioner but, it cannot be gainsaid that the fact that the Advisory Board had recorded such an opinion on identical facts involving a common ground was at least a relevant circumstance which ought to have been placed before the detaining authority in this case. Since three out of the four grounds on which the petitioner was detained have been held to be bad by the High Court, we have to proceed on the basis that the petitioner was detained on the remaining ground only. That ground is similar to one of the grounds on which Shamsi was detained, the transaction being one and the same, as also the incident on which the two orders of detention are based. That is why the opinion of the Advisory Board in Shamsis case becomes relevant in the petitioners case. The failure of the State Government to place before the detaining authority in the instant case, the opinion which the Advisory Board had recorded in favour of a detenu who was detained partly on a ground relating to the same incident deprived the detaining authority of an opportunity to apply its mind to a piece of evidence which was relevant, if not binding. In other words, the detaining authority did not, because it could not apply its mind to a circumstance which, reasonably, could have affected its decision whether or not to pass an order of detention against the petitioner.

While repelling the contention on behalf of the Government that there was a distinction between the petitioners case before the Supreme Court and that of the other detenu, the Supreme Court further observed :-
. ... But the question for consideration is not whether the detaining authority would have been justified in passing the order of detention against the petitioner, even after being apprised of the opinion of the Advisory Board in Shamsis case. The question is whether the order of detention was passed in this case after applying the mind to the relevant facts which bear upon the detention of the petitioner. It seems to us plain that the opinion of the Advisory Board in Shamsis case was, at any rate, an important consideration which would and ought to have been taken into account by the detaining authority in the instant case. That opportunity was denied to it.

7. It is of course true that the aforesaid decision of the Supreme Court related to the question of consideration before the detaining authority. However, in our opinion, such factor would not make any difference and the ratio of the said decision would also be applicable to the stage of consideration of confirmation. As a matter of fact, this Bench has already applied the ratio of the aforesaid Supreme Court decision in H.C.P.No.484 of 2004 disposed of on 14.9.2004, where the question was as to whether the opinion of the Advisory Board and the consequent revocation in respect of a co-detenu on the very same ground incident should be placed before the State Government at the time of confirmation and it has been observed as follows :-
20. As per Section 12(1), even if the Advisory Board gives a opinion

that there is sufficient cause for detention of a person, the State Government is not bound to confirm the order of detention, but the State Government may confirm the detention order. In other words, even though as per Section 12(2) the opinion of the Advisory Board that there is no sufficient cause for the detention is binding and the State Government is bound to revoke the detention in such case, the opinion of the Advisory Board that there is sufficient cause for detention is not binding on the State Government and inspite of such opinion regarding sufficiency for the cause of the detention, the State Government may revoke such detention. It is obvious that while considering the question of confirmation of the order of detention under Section 12(1), the State Government is required to apply its mind to all relevant circumstances. The fact that the Advisory Board had given a particular opinion for releasing a co-detenu, who had been detained on the very same ground case, is obviously a relevant circumstance to be considered by the State Government and the ratio of the decision of the Supreme Court is equally applicable.

8. Learned counsel for the State has placed reliance upon the decision of the Supreme Court reported in 2000 SCC (Cri)1300 (RAJAPPA NELLAKANTAN v. STATE OF T.N. AND OTHERS). In the aforesaid decision, as observed by the Supreme Court itself without referring to the decision reported in AIR 1983 SC 541 (cited above), on the peculiar facts and circumstances of the case it was concluded that the fact that codetenu had been released on the basis of the opinion of the Advisory Board was not a defect warranting interference with the order of detention.

9. As the aforesaid decision was based on its own peculiar facts and circumstances, we do not think the ratio of the aforesaid decision would be made applicable to the present case.

10. As observed by the Supreme Court in AIR 1983 SC 541 (cited above), which has been followed by us in H.C.P.No.484 of 2004, the fact that a co-detenu, who had been detained on the very same ground case, had been released by the State on the basis of the opinion furnished by the Advisory Board is a relevant factor, which should have been placed before the State Government at the time of confirmation. As observed by the Supreme Court and emphasised in the unreported decision, such opinion furnished by the Advisory Board, on the basis of which the order of detention was revoked by the State Government, is not binding on the State Government while considering the question of confirmation in respect of a co-detenu on the basis of the very same ground case but, it cannot be said that such opinion and order of revocation is not relevant. While considering such opinion, it is always open to the confirming authority not to apply such opinion in respect of a co-detenu. However, such opinion should not be with-held from the concerned authority, that is to say, the detaining authority or the confirming authority. It is for the detaining authority or the confirming authority to

either accept or discard such opinion in a collateral case in respect of a co-detenu detained under the very same ground case. Ultimately, the matter has to be considered by the concerned authority and such relevant factor should not be with-held by the sponsoring authority on the ground that the opinion of the Board and the consequential order of revocation are irrelevant.

12. For the aforesaid reasons, in view of the admitted fact that the opinion of the Advisory Board and the subsequent revocation of the order of detention in respect of main accused in the ground case had not been placed before the State Government at the time of confirmation, the order of detention is liable to be quashed.

13. In the result, the HCP is allowed and the detenu is set at liberty forthwith unless he is required in any other connected case.

Index : Yes
Internet: Yes
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To

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3. The Superintendent of Central Prison,
Central Prison, Chennai.

4. The Public Prosecutor,
High Court, Madras.

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